

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**REASONABLENESS OF BNSF
RAILWAY COMPANY COAL
DUST MITIGATION TARIFF
PROVISIONS**

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Docket No. FD 35557

**REPLY OF THE WESTERN COAL TRAFFIC LEAGUE TO BNSF RAILWAY
COMPANY'S MOTION TO COMPEL DISCOVERY**

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Dated: February 6, 2012

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SURFACE TRANSPORTATION BOARD**

**REASONABLENESS OF BNSF
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On January 27, 2012, BNSF Railway Company ("BNSF") filed a document styled, "Motion to Compel Discovery from Western Coal Traffic League" ("Motion to Compel" or "Motion"). BNSF's Motion asks the Surface Transportation Board ("STB" or "Board") to order the Western Coal Traffic League ("WCTL") to produce WCTL Member information and documents that are not in WCTL's possession, custody, or control.

The Board should summarily deny BNSF's Motion because the Board's Rules of Practice prohibit motions asking the Board to order a party to produce information or documents over which a party lacks possession, custody, or control. Moreover, BNSF's real interest appears to be to unlawfully target, and retaliate against, WCTL Members because of WCTL's participation in this proceeding. The Board should not countenance such tactics.

BACKGROUND

The pertinent background facts include the following:

Coal Dust I

BNSF published its initial Coal Dust Tariff¹ in the Spring of 2009.

Following the publication of that Tariff, WCTL sought to engage BNSF in discussions concerning the Tariff but was summarily rebuffed, as were other coal shippers.² In October 2009, Arkansas Electric Cooperative Corporation (“AECC”) filed a petition asking that the Board declare BNSF’s publication of the Coal Dust Tariff constituted an unreasonable practice under 49 U.S.C. § 10702(2). The subsequent proceedings before the Board were denominated Docket No. FD 35305, *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order (“Coal Dust I”)*.

In its Decision served on December 1, 2009, the Board issued an order inviting all interested persons to participate as parties in the *Coal Dust I* proceedings. Many coal shippers and shipper associations accepted the Board’s invitation, including WCTL. WCTL devoted substantial time, money, and resources in *Coal Dust I*, including the submission of 378 pages of comments supported by 12 expert witness verified statements.

¹ “Coal Dust Tariff” refers to Item 100, entitled “Coal Dust Mitigation Requirements,” initially published on April 29, 2009 in Revision 011 to BNSF’s Price List 6041-B and Item 101, entitled “Coal Dust Requirements Black Hills Sub-Division,” initially published on May 27, 2009 in Revision 012 to BNSF’s Price List 6041-B.

² See WCTL’s Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation at 3, STB Docket No. FD 35305 (filed Aug. 11, 2011) (“WCTL Petition”).

On March 3, 2011, the Board issued a decision finding that BNSF's publication of the Coal Dust Tariff constituted an unreasonable practice. The Board relied extensively on WCTL's expert evidence in reaching this result (*id.* at 12-13) and urged the parties to work together to "develop reasonable solutions to the problems presented in this case." *Id.* at 14. BNSF ignored the Board's admonition and proceeded to unilaterally develop and publish its Revised Coal Dust Tariff.³

On August 11, 2011, WCTL requested that the Board take three actions "to avoid another long, drawn-out coal dust proceeding":⁴ reopen the *Coal Dust I* case record to address the legality of BNSF's Revised Coal Dust Tariff; initiate a Board-supervised mediation; and stay the effective date of the Revised Coal Dust Tariff during the pendency of the Board-supervised mediation. *Id.* at 2. WCTL's request was supported by the American Public Power Association ("APPA"), the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), and AECC. BNSF replied in opposition to WCTL's request, but represented for the first time in its reply that it would not take any actions to enforce the Revised Coal Dust Tariff without first giving affected shippers 60 days advance notice.⁵

³ "Revised Coal Dust Tariff" refers to Item 100, entitled "Coal Dust Mitigation Requirements," as originally published on July 20, 2011 in Revision 017 to BNSF's Price List 6041-B, and as amended thereafter.

⁴ WCTL Petition at 2.

⁵ BNSF Railway Company's Reply to Western Coal Traffic League's Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation, (filed Aug. 23, 2011) at 4.

In its decision served on August 31, 2011, the Board denied WCTL's request for an injunction on grounds that the request had been practically mooted by BNSF's reply representations. *See id.* at 3 ("shippers face[] no current possibility of a sanction for noncompliance"). The Board subsequently determined that it would "not order mediation at this time" (Decision served Nov. 22, 2011 at 3) and instituted a new declaratory order proceeding "to address issues raised by WCTL" in its request to reopen *Coal Dust I* (*id.* at 4 n.5). This new proceeding was denominated Docket No. FD 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions* ("Coal Dust II").

Coal Dust II

At the joint request of BNSF and WCTL, the Board adopted an "accelerated" *Coal Dust II* procedural schedule. Decision served December 16, 2011 at 1. Pursuant to that schedule, notices of intent to participate in *Coal Dust II* as parties of record have been submitted on the shipper side by, APPA, EEI, NRECA, WCTL, AECC, National Coal Transportation Association ("NCTA") and Union Electric Company D/B/A Ameren Missouri. The other parties of record are BNSF, Union Pacific Railroad Company ("UP"), and the United States Department of Transportation.

The accelerated procedural schedule also established a 50-day discovery period, which ends on February 6, 2012. On December 23, 2011, Coal Shipper

Associations⁶ jointly served a single set of discovery requests on BNSF⁷ and, on January 18, 2012, Coal Shipper Associations jointly served a single set of follow-up requests.⁸

These are the only discovery requests served on BNSF to date in this proceeding.

Consistent with standard Board practice, Coal Shipper Associations have not demanded that BNSF provide any information or documents that are not within BNSF's possession, custody, or control, nor have Coal Shipper Associations sought any non-party discovery.

BNSF has proceeded down a different path, seeking discovery of a scope and breadth against trade associations and non-parties never before contemplated or sanctioned in any STB proceeding. Specifically, BNSF tendered separate sets of discovery requests against all shipper parties of record, including separate sets of requests to the shipper trade association parties – APPA, EEI, NCTA, NRECA, and WCTL. In a stark departure from standard STB practice, BNSF defined each association as including the association's "members."⁹ Collectively, the associations have more than 3,100 individual member companies.

Each trade association, including WCTL, objected to producing member company information or documents that were not in the "possession, custody, or control"

⁶ "Coal Shipper Associations" refers to of APPA, EEI, NRECA, and WCTL, collectively.

⁷ Coal Shippers' First Set of Interrogatories and Requests for Production of Documents to BNSF Railway Company (a copy of these requests is reproduced in BNSF's Motion, at Exhibit 2).

⁸ Coal Shippers' Second Set of Interrogatories and Request for Admissions to BNSF Railway Company.

⁹ Excerpts of BNSF's discovery requests seeking member-specific information from individual shipper associations are attached hereto at Exhibit 1.

of the association.¹⁰ For its part, WCTL stated that it was providing, or would provide, any specified non-privileged responsive information and documents that were in its possession, custody, and control.¹¹ WCTL completed its responsive production on January 30, 2012.

BNSF also tendered discovery requests on each current, individual WCTL Member – 16 sets in all – with a total of 272 separately numbered requests.¹² BNSF’s requested non-party discovery is unprecedented in STB practice. Each WCTL Member objected individually to BNSF’s attempt to use party-based discovery against non-parties.¹³

BNSF’s Motion to Compel

BNSF’s Motion to Compel asks the Board to order WCTL to produce any information and documents that its Member companies may possess in response to sixteen discovery requests BNSF tendered on WCTL. *Id.* at 1.¹⁴ BNSF also contends that it is not asking the Board for a similar order directed at the other association parties in this case because, BNSF opines, “WCTL is not a typical industry association” (*id.* at 8)

¹⁰ Excerpts of the individual shipper associations’ objections to BNSF’s discovery requests seeking member-specific information are attached hereto at Exhibit 2.

¹¹ See WCTL’s Responses and Objections to BNSF Railway Company’s First Set of Interrogatories and Requests for Production of Documents (“WCTL Discovery Responses”) at 2. (A copy of the WCTL Discovery Responses is set forth in BNSF’s Motion, at Exhibit 4.)

¹² Copies of these requests are set forth in BNSF’s Motion, at Exhibit 3.

¹³ A copy of these objections is set forth in BNSF’s Motion, at Exhibit 4.

¹⁴ BNSF Interrogatory Nos. 4, 7-12, and Requests for Production (“RFP”) Nos. 1-8, 10 (these interrogatories and requests are reproduced hereto in Exhibit 3).

and WCTL's Members may possess "relevant" information. *Id.* at 6. Finally, BNSF requests that if the Board denies its Motion to Compel, the Board should grant its pending petition asking the Board to issue 16 subpoenas – one to each of WCTL's 16 Member companies. *Id.* at 2.¹⁵

ARGUMENT

BNSF's Motion must be summarily denied. WCTL has fully discharged its duties under the Board's Rules of Practice to respond to BNSF's interrogatories and document production requests by producing non-privileged information and documents in WCTL's possession, custody, or control. The Board should also reject BNSF's efforts to target WCTL Members for unlawful, retaliatory discovery. Such abusive tactics should not be sanctioned in this, or any other, STB proceeding.

I.

WCTL HAS RESPONDED FULLY AND PROPERLY TO ALL OF BNSF'S DISCOVERY REQUESTS

The Board's Rules of Practice provide that a "[p]arty means a complainant, defendant, applicant, respondent, protestant, intervenor, or petitioner in any proceeding, or other persons permitted or directed by the Board to participate in a proceeding."¹⁶ WCTL is a "party" in *Coal Dust II* because the Board's December 16, 2011 order

¹⁵ See BNSF Railway Company's Petition for Subpoenas (filed Jan. 27, 2012). Replies to BNSF's Petition for Subpoenas are due on February 16, 2012. WCTL's Reply responds to BNSF's Motion. WCTL reserves the right to respond separately to BNSF's Petition for Subpoenas.

¹⁶ 49 C.F.R. § 1101.2(d).

permitted any person to participate in *Coal Dust II* as a party by filing a timely notice of intent, and WCTL filed such a timely notice.¹⁷

The Board's rules governing party discovery are set forth at 49 C.F.R. § 1114 (Subpart B). These rules provide, subject to stated exceptions, that "any party may serve on any other party a request: . . . [t]o produce . . . any designated documents . . . which are in the possession, custody, or control of the party upon whom the request is served" (49 C.F.R. § 1114.30 (a)(1)) and that "any party may serve upon any other party written interrogatories to be answered by the party served . . . who shall furnish such information as is available to the party." *Id.* at § 1114.26 (a).

Under governing STB case law, information is deemed to be "available to [that] party" only if the party has "possession, custody or control" over the information,¹⁸ and documents or information are deemed to be in a party's "possession, custody or control" if a party possesses, or has a legal right to obtain, requested documents.¹⁹ The Board's rules governing party discovery are modeled after corresponding provisions in

¹⁷ See WCTL's Notice of Intent to Participate (filed Dec. 23, 2011).

¹⁸ *Farmland Indus., Inc. v. Gulf Cent. Pipeline Co.*, ICC Docket No. 40411, 1992 WL 67306 at *5 (ICC decided Apr. 2, 1992) ("*Farmland*"); *Accord Entergy Ark., Inc. v. Union Pac. R.R.*, STB Docket No. 42104 (STB served May 19, 2008) at 5 (ordering UP to produce specified documents "within its possession, custody or control").

¹⁹ *Metro. Edison Co. v. Consol. Rail Corp.*, ICC Docket No. 37931S, 1987 WL 98887 at *4 (ICC decided July 8, 1987) (holding that "[t]o be discoverable, information must be under the control of the party ordered to produce the information" and citing in support of its holding, *United States v. Int'l Bus. Machine Corp.*, 477 F. Supp. 698 (S.D.N.Y. 1979), a case where the federal district court defined "control" as the "legal right" to obtain the requested documents).

the Federal Rules of Civil Procedure,²⁰ which also limit discovery to documents or information a party possesses or has the legal right to obtain.²¹

WCTL has fully complied with its obligations under the Board's rules. WCTL has provided requested non-privileged documents and information in its possession, custody, and control in response to each of the 16 requests subject to BNSF's Motion.²² The additional information BNSF seeks – if it exists at all – is in the possession, custody, or control of individual WCTL Member companies, not WCTL, and WCTL has no ability to compel or otherwise require that its Member companies provide this material to WCTL. *See* appended Verified Statement of Duane L. Richards at 1.

BNSF cites no legal authority for its demand that WCTL produce WCTL Member information that is not in WCTL's possession, custody, and control, and for good reason. Decisions under both the Board's Rules of Practice and the Federal Rules

²⁰ *See Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989 (STB served May 27, 1997) at 1 n.5.

²¹ *See* 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2210 (3d ed. 2010) (“[i]nspection can be had if the party to whom the request is made has the legal right to obtain the document”); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (a party is to produce documents it possesses or has “the legal right to obtain . . . upon demand”).

²² *See* WCTL's Discovery Responses (a copy is set forth in BNSF's Motion, at Exhibit 4) at 4, 9-11 (responding to BNSF Interrogatory Nos. 4 and 7-12 based on information in WCTL's possession, custody, or control) and *id.* at 12-18 (stating in response to BNSF RFP Nos. 1-8 and 10 that WCTL “will engage in a reasonable, good faith search of its files for non-privileged, responsive documents, if any, [in its possession, custody, or control], other than documents produced in STB Finance Docket No. 35305”). As noted above, WCTL completed its document production on January 30, 2012.

of Civil Procedure uniformly hold that an unincorporated association cannot be compelled to produce member information or documents over which the association has no possession, custody, or control.²³ Indeed, in BNSF's discovery responses to Coal Shipper Association's discovery requests, BNSF itself objected to producing any documents "that are not in the possession, custody, or control of BNSF."²⁴

BNSF also repeatedly argues that because WCTL is participating in the *Coal Dust II* case "on behalf" of its Members, party-based discovery is appropriate. *See, e.g.,* Motion at 1, 2. However, for discovery purposes, unincorporated associations are "jural entities," separate and distinct from their members, so the fact that an unincorporated association may be pursuing litigation "on behalf" of its members, does not make the members themselves parties to the case for discovery purposes. *Sperry Prods. Inc. v. Ass'n of Am. R.R.s*, 132 F.2d 408, 411 (2d Cir. 1942); *Vratil*, 96 F.3d at 1340; *Farmland* at *5.

²³ *See, e.g., Farmland* at *5 (denying motion to compel trade association to produce member information not in the "possession, custody, or control" of the association); *Univ. of Tex. v. Vratil*, 96 F.3d 1337, 1339-40 (10th Cir. 1996) (members of an unincorporated association cannot be "ordered to respond to interrogatories" served on the association).

²⁴ BNSF Railway Company's Responses and Objections to Coal Shippers' First Set of Interrogatories and Document Requests (dated Jan. 9, 2012) at 3 (excerpts reproduced hereto at Exhibit 4).

II.

RETALIATORY DISCOVERY AGAINST WCTL MEMBERS IS CLEARLY IMPERMISSIBLE

BNSF claims that it is seeking discovery from WCTL Members because WCTL is “not a typical” trade association and because WCTL’s Members may possess information that BNSF is legally entitled to obtain through discovery. Neither assertion is correct, and it is obvious that BNSF’s real motivation here is to try to retaliate against WCTL because WCTL is participating in this proceeding.²⁵

A. WCTL Is A Typical Trade Association

BNSF’s claims that it has targeted WCTL Members for discovery in this case because, it asserts, WCTL is “not a typical” trade association. Motion at 8. This assertion does not pass the laugh test. Application of BNSF’s criteria for distinguishing “typical” and “atypical” associations shows that WCTL is just as “typical” a trade association as many other trade associations, including the Association of American Railroads (“AAR”) – BNSF’s own trade association:

- BNSF claims that WCTL is atypical because it “[i]s an unincorporated association.” *Id.* In fact, many trade associations are or have been “unincorporated,” including the AAR – which for many years was an unincorporated association.²⁶

²⁵ “Fear of reprisal from railroads” is a principle reason why many shippers do not participate in proceedings before the Board. See U.S. Gov’t Accounting Office, GAO/RCED-99-46, *Current Issues Associated with the Rate Relief Process* 46 (1999).

²⁶ See *Ass’n of Am. R.R.s v. United States*, 371 F. Supp. 114, 115 (D.D.C 1974) (“[t]he plaintiff Association of American Railroads is an unincorporated association”).

- BNSF claims that WCTL is atypical because individual WCTL Members do not have to participate in specific WCTL activities. Motion at 8. In fact, most trade associations preserve the right of independent action by their members or associate members, including the AAR.²⁷

- BNSF claims that WCTL is atypical because WCTL's sole purpose is to "engage in litigation." Motion at 8. In fact, WCTL, just like many other trade associations including the AAR, represents the interests of its members in litigation, and non-litigation, matters before Congress, administrative agencies and the courts.²⁸ Moreover, the AAR is far more litigious than WCTL at the STB.²⁹

BNSF's real motivation is obvious: it wants to discourage WCTL from participating in STB proceedings by seeking to establish a new discovery rule to apply only to WCTL: WCTL Members are exposed to party-based discovery in every case where WCTL becomes a party. The Board should not tolerate such obvious retaliatory

²⁷ See, e.g., *AAR Associate Advisory Board Rules of Organization*, Section 4 ("the right of individual and independent action is expressly reserved to each [Associate AAR] member"), available at www.aar.org/About-US/Membership/~media/aar/Members%20Area/Associate-Program-Rules-of-Organization-2012.ashx; *Major Rail Consol. Procedures*, STB Ex Parte No. 582 (Sub-No.1) (STB served June 11, 2001) at 99 n.70 (Board states that the AAR disclosed to the Board that one AAR member did not "participate in" AAR's filings in the proceeding).

²⁸ Compare <http://www.westerncoaltrafficleague.com> ("WCTL has advanced and protected the interests of western coal consumers before the United States Congress, the United States Departments of Commerce, Interior, Justice and Transportation; federal and state courts; and numerous federal and state regulatory departments and agencies") with Brief of *Amici Curiae* of the AAR *et. al.* in Support of Petitioner at 3, S.Ct. No. 08-604, *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs.* (filed June 2, 2009) ("AAR represents its members in connection with a wide variety of administrative, legislative, and judicial matters").

²⁹ For example, the Board's website shows that from January 1, 2009 to date, the AAR has participated in 30 STB proceedings, whereas WCTL has participated in only 13 proceedings.

tactics against WCTL,³⁰ an organization that has actively participated in good faith in all major cases involving western coal transportation since the organization was founded in 1977.

B. BNSF Is Not Entitled to the Information It Seeks

BNSF also claims that its requested discovery against WCTL Members is required because WCTL Members may possess “relevant” information that is responsive to BNSF’s discovery requests. Motion at 5-6. In cases of industry-wide importance, many non-parties may possess “relevant” information. For example in this case, “relevant” information may be possessed by many non-party coal shippers other than WCTL Members, by non-party PRB coal mines, by non-party surfactant suppliers, by non-party water supply contractors, by non-party railroads, *etc.* Tellingly, BNSF’s asserted interest in “relevant” non-party information begins and ends with WCTL’s Members.

Moreover, the Board “requires more than a minimal showing of potential relevancy before granting a motion to compel discovery.”³¹ Instead, a party “must demonstrate a real, practical need for the information.” *Id.* “[D]iscovery also may be denied if it would be unduly burdensome in relation to the likely value of the information

³⁰ *Accord E & J Gallo Winery v. Encana Energy Servs., Inc.*, No. 03-5412, 2005 WL 6408198 at *5-6 (E.D. Cal. July 5, 2005) (engaging in “retaliatory discovery and motion practices” is a “harassing tactic” not tolerated in federal district court litigation).

³¹ *Total Petrochemicals USA, Inc. v. CSX Transp. Inc.*, STB Docket No. 42121 (STB served Nov. 24, 2010) at 2 (internal quotations and citations omitted).

sought”³² or if the discovery sought is not consistent with governing “expedited” case procedures.³³

BNSF’s Motion will be searched in vain for any demonstration of “a real, practical need for the information” sought. BNSF simply provides bromides such as the discovery it seeks “may have a direct bearing on the issues in this proceeding” or is “necessary to develop a full record.” Motion at 7-8. This boilerplate provides no basis for forced discovery against WCTL Members.

Discovery against WCTL Members would also be extraordinarily burdensome and unduly delay these accelerated proceedings. WCTL has already expended substantial time and effort responding to BNSF’s discovery requests. If discovery is ordered against each of WCTL’s 16 Members, the collective burden is 16 times greater than the burden WCTL has already incurred. Substantial case delays would also result because, among other things, each WCTL Member would need time to review the requests, tender Member-specific objections, address member-specific confidentiality issues, collect responsive materials (if any), and engage BNSF in any resulting Member-specific discovery disputes (including potential additional motions to compel).

³² *Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook R.R.*, STB Docket No. AB-124 (Sub-No. 2) at 2 (STB served Nov. 14, 2003).

³³ *Canexus Chems. Canada, L.P. v. BNSF Ry.*, STB Docket No. 42132 (STB served Feb. 2, 2012) at 4-5.

CONCLUSION

WCTL respectfully requests that the Board deny BNSF's Motion to
Compel for the reasons set forth above.

Respectfully submitted,

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Dated: February 6, 2012

*Attorneys for Western Coal
Traffic League*

CERTIFICATE OF SERVICE

I hereby certify that this 6th day of February, 2012, I have caused copies of the forgoing Reply to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding.



Peter A. Pföhl

EXHIBIT 1

Exhibit 1

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION TARIFF PROVISIONS

BNSF RAILWAY COMPANY'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO AMERICAN PUBLIC POWER ASSOCIATION

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, submits the following First Set of Interrogatories and Requests for Production of Documents to American Public Power Association ("APPA"). BNSF requests that APPA serve its written objections and answers by January 25, 2012, and that APPA produce copies of responsive documents at the offices of Steptoe & Johnson LLP on a rolling basis, as the documents become available.

BNSF is prepared to cooperate with APPA to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. BNSF is also willing to abide by the terms of the joint proposed protective order for this case submitted by BNSF and Western Coal Traffic League ("WCTL") to the STB on December 20, 2011 in the event that the STB has not entered the protective order by the time APPA responds to these discovery requests. BNSF requests that APPA promptly contact BNSF's undersigned counsel should APPA have any questions regarding the meaning or scope of

8. "Load Profiling" means loading uncovered coal cars in accordance with the "Redesigned Chute Diagram" included in the Coal Loading Rule.

9. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. "PRB" means the Powder River Basin located in Montana and Wyoming.

11. "Refer or relate to" means information that contains, describes, discusses, embodies, comments upon, identifies, incorporates, explains, contradicts, supports, regards, evidences, evaluates, summarizes, constitutes, comprises, or otherwise pertains to the subject matter of the request.

12. "Topper Agent" means a chemical agent, such as a surfactant, that is applied to the surface of coal in loaded rail cars for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.

13. "You" and "Your" refer to APPA, as well as its committees, subcommittees, members, any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

14. When used in these requests, the phrase "in transit by rail" should be construed to include the movement of coal over any rail lines of any railroad and is not limited to movements of coal over the Joint Line or over BNSF's lines in the Black Hills Subdivision.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S
FIRST SET OF INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
EDISON ELECTRIC INSTITUTE**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, submits the following First Set of Interrogatories and Requests for Production of Documents to Edison Electric Institute ("EEI"). BNSF requests that EEI serve its written objections and answers by January 25, 2012, and that EEI produce copies of responsive documents at the offices of Steptoe & Johnson LLP on a rolling basis, as the documents become available.

BNSF is prepared to cooperate with EEI to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. BNSF is also willing to abide by the terms of the joint proposed protective order for this case submitted by BNSF and Western Coal Traffic League ("WCTL") to the STB on December 20, 2011 in the event that the STB has not entered the protective order by the time EEI responds to these discovery requests. BNSF requests that EEI promptly contact BNSF's undersigned counsel should EEI have any questions regarding the meaning or scope of any of these

8. “Load Profiling” means loading uncovered coal cars in accordance with the “Redesigned Chute Diagram” included in the Coal Loading Rule.

9. “Person” means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. “PRB” means the Powder River Basin located in Montana and Wyoming.

11. “Refer or relate to” means information that contains, describes, discusses, embodies, comments upon, identifies, incorporates, explains, contradicts, supports, regards, evidences, evaluates, summarizes, constitutes, comprises, or otherwise pertains to the subject matter of the request.

12. “Topper Agent” means a chemical agent, such as a surfactant, that is applied to the surface of coal in loaded rail cars for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.

13. “You” and “Your” refer to EEI, as well as its committees, subcommittees, members, any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

14. When used in these requests, the phrase “in transit by rail” should be construed to include the movement of coal over any rail lines of any railroad and is not limited to movements of coal over the Joint Line or over BNSF’s lines in the Black Hills Subdivision.

**BEFORE THE
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STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S
FIRST SET OF INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
NATIONAL COAL TRANSPORTATION ASSOCIATION**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, submits the following First Set of Interrogatories and Requests for Production of Documents to National Coal Transportation Association ("NCTA"). BNSF requests that NCTA serve its written objections and answers by January 25, 2012, and that NCTA produce copies of responsive documents at the offices of Steptoe & Johnson LLP on a rolling basis, as the documents become available.

BNSF is prepared to cooperate with NCTA to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. BNSF is also willing to abide by the terms of the joint proposed protective order for this case submitted by BNSF and Western Coal Traffic League ("WCTL") to the STB on December 20, 2011 in the event that the STB has not entered the protective order by the time NCTA responds to these discovery requests. BNSF requests that NCTA promptly contact BNSF's undersigned counsel should NCTA have any questions regarding the meaning or scope of

8. “Load Profiling” means loading uncovered coal cars in accordance with the “Redesigned Chute Diagram” included in the Coal Loading Rule.

9. “Person” means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. “PRB” means the Powder River Basin located in Montana and Wyoming.

11. “Refer or relate to” means information that contains, describes, discusses, embodies, comments upon, identifies, incorporates, explains, contradicts, supports, regards, evidences, evaluates, summarizes, constitutes, comprises, or otherwise pertains to the subject matter of the request.

12. “Topper Agent” means a chemical agent, such as a surfactant, that is applied to the surface of coal in loaded rail cars for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.

13. “You” and “Your” refer to NCTA, as well as its committees, subcommittees, members, any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

14. When used in these requests, the phrase “in transit by rail” should be construed to include the movement of coal over any rail lines of any railroad and is not limited to movements of coal over the Joint Line or over BNSF’s lines in the Black Hills Subdivision.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S
FIRST SET OF INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, submits the following First Set of Interrogatories and Requests for Production of Documents to National Rural Electric Cooperative Association ("NRECA"). BNSF requests that NRECA serve its written objections and answers by January 25, 2012, and that NRECA produce copies of responsive documents at the offices of Steptoe & Johnson LLP on a rolling basis, as the documents become available.

BNSF is prepared to cooperate with NRECA to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. BNSF is also willing to abide by the terms of the joint proposed protective order for this case submitted by BNSF and Western Coal Traffic League ("WCTL") to the STB on December 20, 2011 in the event that the STB has not entered the protective order by the time NRECA responds to these discovery requests. BNSF requests that NRECA promptly contact BNSF's undersigned counsel should NRECA have any questions regarding the meaning

8. “Load Profiling” means loading uncovered coal cars in accordance with the “Redesigned Chute Diagram” included in the Coal Loading Rule.

9. “Person” means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. “PRB” means the Powder River Basin located in Montana and Wyoming.

11. “Refer or relate to” means information that contains, describes, discusses, embodies, comments upon, identifies, incorporates, explains, contradicts, supports, regards, evidences, evaluates, summarizes, constitutes, comprises, or otherwise pertains to the subject matter of the request.

12. “Topper Agent” means a chemical agent, such as a surfactant, that is applied to the surface of coal in loaded rail cars for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.

13. “You” and “Your” refer to NRECA, as well as its committees, subcommittees, members, any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

14. When used in these requests, the phrase “in transit by rail” should be construed to include the movement of coal over any rail lines of any railroad and is not limited to movements of coal over the Joint Line or over BNSF’s lines in the Black Hills Subdivision.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S
FIRST SET OF INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
WESTERN COAL TRAFFIC LEAGUE**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, submits the following First Set of Interrogatories and Requests for Production of Documents to Western Coal Traffic League ("WCTL"). BNSF requests that WCTL serve its written objections and answers by January 16, 2012, and that WCTL produce copies of responsive documents at the offices of Steptoe & Johnson LLP on a rolling basis, with full production completed by January 30, 2012.

BNSF is prepared to cooperate with WCTL to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. BNSF is also willing to abide by the terms of the joint proposed protective order for this case submitted to the STB on December 20, 2011 in the event that the STB has not entered the protective order by the time WCTL responds to these discovery requests. BNSF requests that WCTL promptly contact BNSF's undersigned counsel should WCTL have any questions regarding the meaning or scope of any of these discovery requests, the nature of the

8. "Load Profiling" means loading uncovered coal cars in accordance with the "Redesigned Chute Diagram" included in the Coal Dust Loading Rule.

9. "Member Company" means an entity of any kind that is a member of WCTL.

10. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

11. "Refer or relate to" means information that contains, describes, discusses, embodies, comments upon, identifies, incorporates, explains, contradicts, supports, regards, evidences, evaluates, summarizes, constitutes, comprises, or otherwise pertains to the subject matter of the request.

12. "Topper Agent" means a chemical agent, such as a surfactant, that is applied to the surface of loaded rail cars for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.

13. "You" and "Your" refer to WCTL, as well as its committees, subcommittees, Member Companies, any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

14. When used in these requests, the phrase "in transit by rail" should be construed to include the movement of coal over any rail lines of any railroad and is not

limited to movements of coal over the Joint Line or over BNSF's lines in the Black Hills Subdivision.

INSTRUCTIONS

1. Unless otherwise indicated, these requests cover the period from January 1, 2010 to the time Your responses are served on BNSF.

2. You are not required to reproduce any responsive documents produced in STB Finance Docket No. 35305 if the STB approves the proposed protective order that BNSF and WCTL filed with the STB on December 20, 2011.

3. You are required to produce documents in the possession, custody, or control of You or Your Member Companies.

4. "And"/"Or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of each document request all documents which might otherwise be construed as outside the scope of the document request.

5. References to the singular shall be construed to be plural, and references to the plural shall be singular, as necessary in order to bring within the scope of each document request all documents which might otherwise be construed to be outside the scope of the document request.

6. If any document called for by these requests for production is available in machine-readable format, please produce the document or information in that format, along with a description of the format and a decoder as well as any other information, necessary and sufficient to permit access to and an understanding of the electronic information.

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**RESPONSES AND OBJECTIONS TO BNSF
RAILWAY COMPANY'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO AMERICAN PUBLIC POWER ASSOCIATION**

American Public Power Association ("APPA"), pursuant to 49 C.F.R. Part 1114, hereby responds to the First Set of Interrogatories and Requests for Production of Documents (collectively "Requests") served by BNSF Railway Company ("BNSF") on January 10, 2012.

GENERAL RESPONSES AND OBJECTIONS

In addition to the specific objections raised below in response to individual Requests, APPA objects generally to BNSF's Definitions, Instructions, Interrogatories, and Requests as follows:

1. APPA objects to BNSF's Requests to the extent that they seek documents or information protected by the attorney-client privilege and/or subject to the attorney work-product doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection. In addition, APPA objects to BNSF Instruction No. 6 (requiring APPA

to state the specific factual and legal basis for withholding documents) on grounds of burden and relevance.

2. APPA objects to BNSF's Requests to the extent they would impose burdens or obligations on APPA exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114, as interpreted and applied in prior Board rulings, and reserves the right to supplement its objections as necessary.

3. APPA objects to BNSF's Requests seeking APPA to "identify" or "describe," and to BNSF's Instruction Nos. 7, 8, and 9 as unduly burdensome and beyond the scope of permissible discovery to the extent the Requests would impose a burden or obligation on APPA exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114.

4. APPA objects to BNSF's Requests as unduly burdensome to the extent that they seek documents or information: (i) in BNSF's own possession; (ii) readily available from public sources; (iii) produced and/or filed in STB Finance Docket No. 35305; or (iv) the subject of APPA's discovery requests to BNSF in this proceeding.

5. APPA objects to BNSF's Definition No. 13 ("You" and "Your") to the extent that it requests documents or information from APPA not in its possession, custody, or control, including, but not limited to, documents or information in the possession, custody, or control of its members. APPA's members are not parties to this proceeding and APPA does not control those members or their records.

6. APPA objects to producing documents or information that is confidential, commercially sensitive, or proprietary, including sensitive nonpublic

**BEFORE THE
SUFRACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**EDISON ELECTRIC INSTITUTE'S ANSWERS AND OBJECTIONS TO
BNSF RAILWAY COMPANY'S FIRST SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS**

The Edison Electric Institute ("EEI") provides the following Answers and Objections, pursuant to 49 C.F.R. Part 1114, in response to First Set of Interrogatories and Requests for Production of Documents (collectively, "Requests") served by BNSF Railway Company ("BNSF") on January 10, 2012.

GENERAL OBJECTIONS

In addition to the specific objections raised below in response to individual Requests, EEI objects generally to BNSF's Definition, Instruction, Interrogatories and Requests as follows:

1. EEI objects to BNSF's Requests to the extent that they seek documents or information protected by the attorney-client privilege and/or subject to the attorney work-product doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection. In addition, EEI objects to BNSF's Instruction No. 6, which requires EEI to state the specific factual and legal basis for withholding documents, on the grounds of burden and relevance.

2. EEI objects to BNSF's Requests to the extent that they would impose burdens or obligations on EEI exceeding those specified in applicable provisions of the Board's Rules of

Practice at 49 C.F.R. Part 1114, as interpreted and applied in prior Board rulings, and reserves the right to supplement its objections as necessary.

3. EEI objects to BNSF's Requests seeking to have EEI "identify" or "describe" and to BNSF's Instructions Nos. 7, 8 and 9 as unduly burdensome and beyond the scope of permissible discovery to the extent that the Requests would impose a burden or obligation on EEI exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114.

4. EEI objects to BNSF's Requests as unduly burdensome to the extent that they seek documents or information: (i) in BNSF's own possession; (ii) readily available from public sources; or (iii) produced and/or filed in STB Finance Docket No. 35305. EEI also objects to Definition No. 6 to the extent that it defines "Document(s)" to include any documents or information: (i) in BNSF's own possession; (ii) readily available from public sources; or (iii) produced and/or filed in STB Finance Docket No. 35305.

5. EEI objects to BNSF's Definition No. 13 ("You and "Your"), on grounds that it is inconsistent with the Board's Rules of Practice found at 49 C.F.R. §§ 1101.2(d), 1114.26 and 1114.30, and objects to BNSF's Requests to the extent that they request documents or information from EEI not in its possession, custody or control, including, but not limited to, documents or information in the possession, custody or control of EEI's members. EEI's members are not parties to this proceeding, and EEI does not control those members or their records.

6. EEI objects to producing documents or information that is or are confidential, commercially sensitive or proprietary, including sensitive nonpublic information relating to third

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**THE NATIONAL COAL TRANSPORTATION ASSOCIATION'S
RESPONSES AND OBJECTIONS TO BNSF RAILWAY COMPANY'S FIRST
SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Pursuant to 49 C.F.R. Part 1114, the National Coal Transportation Association ("NCTA") hereby submits its responses and objections to BNSF Railway Company's ("BNSF") First Set of Interrogatories and Requests for Production of Documents.

GENERAL OBJECTIONS

These General Objections apply to each Interrogatory and Request for Production of Documents and are in addition to any specific objection set forth with respect to an individual Interrogatory or a Request for Production of Documents.

A. NCTA objects to BNSF's discovery requests, definitions, and instructions to the extent they seek to impose obligations on NCTA beyond those established by the Surface Transportation Board's discovery rules.

B. NCTA objects to BNSF's discovery requests to the extent that any request may be construed as calling for information that is subject to a claim of privilege or immunity, including, without limitation, the attorney-client privilege or the work product immunity. NCTA hereby asserts such privileges or immunities and objects to the production of information subject

thereto. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection.

C. NCTA objects to BNSF's discovery requests to the extent BNSF seeks information that NCTA has already produced to BNSF or filed in STB Finance Docket 35305, and any information dated prior to January 1, 2010.

D. NCTA objects to BNSF's discovery requests to the extent BNSF seeks responsive information and materials in NCTA's files that were created by BNSF or that are otherwise known to BNSF or in BNSF's possession, respectively.

E. NCTA objects to the definition of "Document(s)" and the use of the term "refer or relate to," on the grounds they are overly broad, unduly burdensome, and beyond the scope of permissible discovery as they (1) encompass materials that are outside the possession, custody and control of NCTA, as defined in paragraph F below, and (2) would require NCTA to search records where there is no reasonable likelihood of finding any responsive documents.

F. NCTA objects to the definition of "You" and "Your" as overly broad and beyond the scope of permissible discovery to the extent it encompasses more than the corporate entity of the National Coal Transportation Association, a Colorado Non-Profit Corporation located at 4 Meadow Lark Lane, Suite 100, Littleton Colorado 80127, and responsive materials located in the files of NCTA's headquarter offices. NCTA particularly objects to this definition to the extent it encompasses NCTA's members on the grounds it is overly broad, unduly burdensome and beyond the scope of permissible discovery. NCTA further objects to BNSF's definition of "You" and "Your" to the extent it includes materials in the possession and control of "independent contractors, expert consultants . . . and all other persons acting (or who act or have acted) on [NCTA's] behalf."

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**RESPONSES AND OBJECTIONS TO BNSF
RAILWAY COMPANY'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

National Rural Electric Cooperative Association ("NRECA"), pursuant to 49 C.F.R. Part 1114, hereby responds to the First Set of Interrogatories and Requests for Production of Documents (collectively "Requests") served by BNSF Railway Company ("BNSF") on January 10, 2012.

GENERAL RESPONSES AND OBJECTIONS

In addition to the specific objections raised below in response to individual Requests, NRECA objects generally to BNSF's Definitions, Instructions, Interrogatories, and Requests as follows:

1. NRECA objects to BNSF's Requests to the extent that they seek documents or information protected by the attorney-client privilege and/or subject to the attorney work-product doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection. In addition, NRECA objects to BNSF Instruction No. 6 (requiring

NRECA to state the specific factual and legal basis for withholding documents) on grounds of burden and relevance.

2. NRECA objects to BNSF's Requests to the extent they would impose burdens or obligations on NRECA exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114, as interpreted and applied in prior Board rulings, and reserves the right to supplement its objections as necessary.

3. NRECA objects to BNSF's Requests seeking NRECA to "identify" or "describe," and to BNSF's Instruction Nos. 7, 8, and 9 as unduly burdensome and beyond the scope of permissible discovery to the extent the Requests would impose a burden or obligation on NRECA exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114.

4. NRECA objects to BNSF's Requests as unduly burdensome to the extent that they seek documents or information: (i) in BNSF's own possession; (ii) readily available from public sources; (iii) produced and/or filed in STB Finance Docket No. 35305; or (iv) the subject of NRECA's discovery requests to BNSF in this proceeding.

5. NRECA objects to BNSF's Definition No. 13 ("You" and "Your") to the extent that it requests documents or information from NRECA not in its possession, custody, or control, including, but not limited to, documents or information in the possession, custody, or control of its members. NRECA's members are not parties to this proceeding and NRECA does not control those members or their records.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**RESPONSES AND OBJECTIONS TO BNSF
RAILWAY COMPANY'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO WESTERN COAL TRAFFIC LEAGUE**

The Western Coal Traffic League ("WCTL"), pursuant to 49 C.F.R. Part 1114, hereby responds to the First Set of Interrogatories and Requests for Production of Documents (collectively "Requests") served by BNSF Railway Company ("BNSF") on December 30, 2011.

GENERAL RESPONSES AND OBJECTIONS

In addition to the specific objections raised below in response to individual Requests, WCTL objects generally to BNSF's Definitions, Instructions, Interrogatories, and Requests as follows:

1. WCTL objects to BNSF's Requests to the extent that they seek documents or information protected by the attorney-client privilege and/or subject to the attorney work-product doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection. In addition, WCTL objects to BNSF Instruction No. 7 (requiring

WCTL to state the specific factual and legal basis for withholding documents) on grounds of burden and relevance.

2. WCTL objects to BNSF's Requests to the extent they would impose burdens or obligations on WCTL exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114, as interpreted and applied in prior Board rulings, and reserves the right to supplement its objections as necessary.

3. WCTL objects to BNSF's Requests seeking WCTL to "identify," "state," "describe," or "explain," and to BNSF's Instruction Nos. 8, 9, and 10 as unduly burdensome and beyond the scope of permissible discovery to the extent the Requests would impose a burden or obligation on WCTL exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114.

4. WCTL objects to BNSF's Requests as unduly burdensome to the extent that they seek documents or information: (i) in BNSF's own possession; (ii) readily available from public sources; (iii) produced and/or filed in STB Finance Docket No. 35305; or (iv) the subject of WCTL's discovery requests to BNSF in this proceeding.

5. WCTL objects to BNSF's Definition No. 9 ("Member Company"), Definition No. 13 ("You" and "Your"), and Instruction No. 3 ("documents in the possession, custody, or control of You or Your Member Companies"), to the extent that they request documents or information from WCTL not in its possession, custody, or control, including, but not limited to, documents or information in the possession, custody, or control of its members. WCTL's members are not parties to this proceeding and WCTL does not control those members or their records.

EXHIBIT 3

INTERROGATORIES

4. Please identify any studies or analyses that You or a Member Company are aware of that evaluate, estimate, or otherwise refer or relate to the costs of coal dust suppression products or services.

7. Please identify each Member Company that has caused a Topper Agent to be applied to at least one rail car loaded with coal since July 1, 2010.

8. Please identify each Member Company that has caused a method of suppressing coal dust, other than a Topper Agent or Load Profiling, to be applied to at least one rail car loaded with coal since July 1, 2010.

9. Please describe arrangements that any of Your Member Companies have made with a coal mine or a supplier of coal dust suppression products or services for the future application of a Topper Agent to rail cars loaded with coal.

10. Please describe arrangements that any of Your Member Companies have made with a coal mine or a supplier of coal dust suppression products or services for the future application of a method of suppressing coal dust, other than a Topper Agent or Load Profiling, to rail cars loaded with coal.

11. Please describe requests made by any of Your Member Companies to a coal mine or a supplier of coal dust suppression products or services for estimates of the costs to apply coal dust suppression products or services, including but not limited to Topper Agents, to rail cars loaded with coal, and please describe any responses to such requests.

12. Please identify any coal dust suppression products or services, including but not limited to chemicals applied to coal at the mines or at power generating facilities,

employed by any of Your Member Companies to reduce the amount of coal that is lost from coal stockpiles at power generating facilities, and please identify the costs of applying any such coal dust suppression products or services.

REQUESTS FOR PRODUCTION

1. Please produce all documents created on or after January 1, 2005 that contain, reflect, or otherwise refer or relate to analyses performed by You, a Member Company, or any other Person relating to the quantity of coal lost from rail cars while the coal is in transit by rail.

2. Please produce all documents created on or after January 1, 2005 that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to:

(a) the costs of such methods;

(b) any comparisons of the costs of such methods with the costs of alternative methodologies; and

(c) the effectiveness of such methods.

3. Please produce all documents created on or after January 1, 2009 that refer or relate to arrangements, agreements, contracts, quotes, bids, offers, or any other communications between You or a Member Company and any Person, including but not limited to coal mines or suppliers of coal dust suppression products or services, regarding methods that could be used at coal mines to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.

4. Please produce all documents that refer or relate to Your plans or the plans of Your Member Companies to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.

5. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on property or rail cars owned by railroads, coal mines, coal shippers, or utilities.

6. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on the generation of power at particular power generating facilities or at power generating facilities in general.

7. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of coal that is lost from coal stockpiles at power generating facilities, including but not limited to:

(a) the costs of such methods;

(b) any comparisons of the costs of such methods with the costs of alternative methodologies;

(c) the effectiveness of such methods; and

(d) the impact such methods have on the generation of power at particular power generating facilities or at power generating facilities in general.

8. Please produce all minutes, reports, agendas, summaries, or other documents referring or relating to meetings or conferences, including meetings of WCTL

committees or subcommittees, at which the subject of coal that is lost from rail cars while the coal is in transit by rail was discussed.

10. Please produce all documents that refer or relate to communications between You or a Member Company and any Person regarding the Coal Dust Loading Rule.

EXHIBIT 4

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS
TO COAL SHIPPERS' FIRST SET OF INTERROGATORIES
AND DOCUMENT REQUESTS**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Defendant BNSF Railway Company ("BNSF") hereby responds and objects to the First Set of Interrogatories and Document Requests served by Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association (collectively "Coal Shippers") on December 23, 2011 ("Coal Shippers' First Set of Requests").

GENERAL OBJECTIONS

The following general objections are made with respect to Coal Shippers' First Set of Requests.

1. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek documents that contain information that is confidential, commercially sensitive, or proprietary, including sensitive nonpublic information relating to third parties, that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

2. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of

information relating to UP trains operating on the Joint Line.

OBJECTIONS TO DEFINITIONS

The following objections to definitions are made with respect to Coal Shippers' First Set of Requests.

1. BNSF objects to the definition of "Analyses" as vague to the extent it includes "other types of written, printed, or electronic submissions of information."
2. BNSF objects to the definition of "BNSF" on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires the production of information or documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, consultants, affiliates, all other persons acting (or who have acted) on BNSF's behalf, and "any contractors retained to perform services in connection with coal transportation services relating to the coal movements affected by this proceeding." Subject to this objection, BNSF will produce responsive, non-privileged documents that are reasonably available from its two primary coal dust consulting firms, Simpson Weather Associates ("SWA") and Conestoga-Rovers & Associates ("CRA"), that relate to the principal consulting activities that those firms performed for BNSF.
3. BNSF objects to the definitions of "document," "related," "related to," and "relating to" on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include materials that are not in BNSF's possession, custody, or control.

**VERIFIED STATEMENT OF
DUANE L. RICHARDS**

VERIFIED STATEMENT OF
DUANE L. RICHARDS

1. My name is Duane L. Richards and my business address is 12050 North Pecos Street, Suite 100, Westminster, Colorado 80234. I am Chief Executive Officer of Western Fuels Association, Inc. and I also serve as President of the Western Coal Traffic League (“WCTL”).

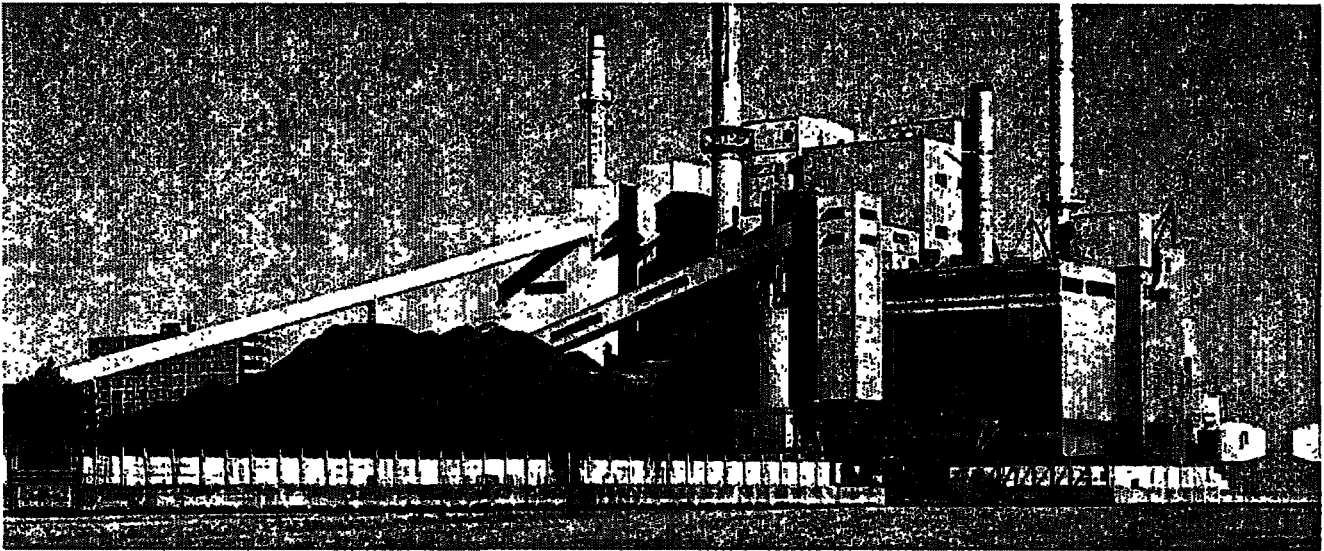
2. WCTL is an unincorporated trade association. WCTL currently has 16 Member companies.

3. WCTL engages in both litigation and non-litigation activities related to the transportation of coal mined west of the Mississippi River. I append in my Attachment DLR-1 information from WCTL’s website (www.westerncoaltrafficleague.com) that provides additional details on WCTL’s activities.

4. Since its formation in 1977, WCTL has participated in all major proceedings before the Interstate Commerce Commission and the Surface Transportation Board involving western coal transportation issues.

5. WCTL has no ability to compel or otherwise require that its Member companies provide documents or information to it.

6. WCTL Member companies retain the right of individual action in connection with all activities WCTL undertakes.



Western Coal Traffic League

The Western Coal Traffic League (WCTL) is a voluntary association comprised of consumers of coal produced from United States mines located west of the Mississippi River. WCTL was founded to advocate the interests of consumers of western coal. Beginning in 1977, WCTL has advanced and protected the interests of western coal consumers before the United States Congress, the United States Departments of Commerce, Interior, Justice and Transportation, federal and state courts; and numerous federal and state regulatory departments and agencies including the U.S. Surface Transportation Board, the Bureau of Land Management and the Federal Trade Commission.

These engagements have included challenges to the imposition of increased federal royalties on coal; opposition to the attempted consolidation of coal producers; opposition to mergers by western railroads; opposition to undue taxes for the reclamation of western mines; and opposition to various unfair and unreasonable practices by western railroads in connection with their haulage of western coal. Because WCTL is committed solely to the interests of coal consumers, its membership does not include producers or transporters of western coals. WCTL members include publicly traded companies, local governments, cooperatives, and government authorities. Collectively they purchase, transport, and consume over 200 million tons of western coal each year.

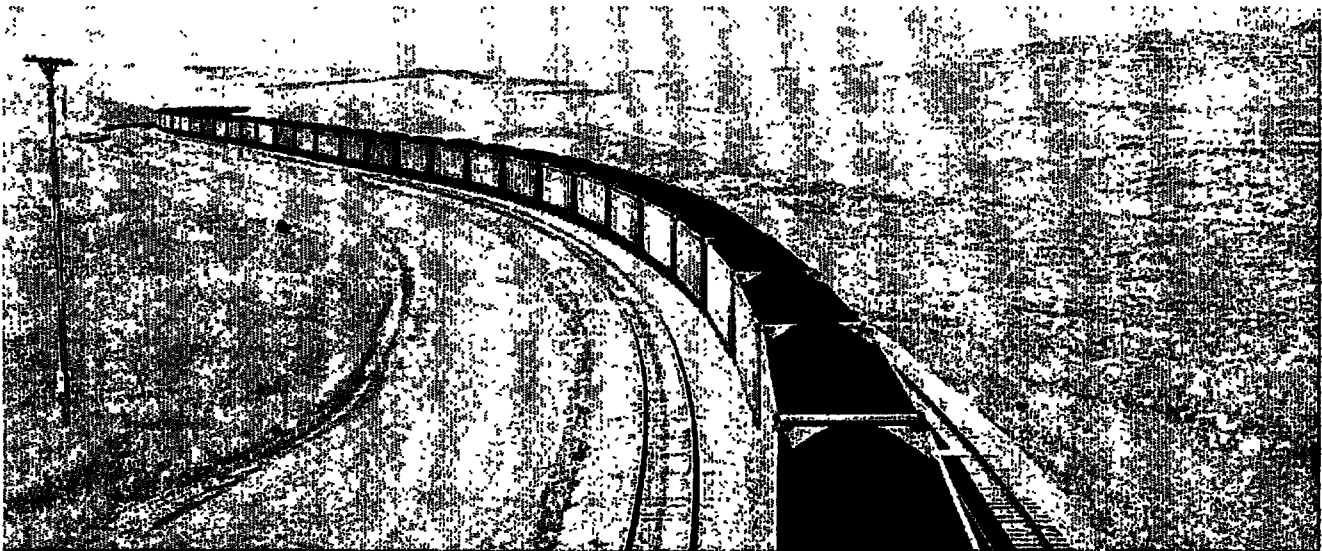
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Our History

The Western Coal Traffic League (WCTL) was first formed by a group of electric generators which were commencing their initial use of western coal as a consequence of the OPEC oil embargo and the new federal requirements of 1975 which precluded the use of oil and gas in some old and all new powerplants. In their conversion from oil and gas to coal as a baseload fuel, these new coal consumers faced a formidable array of economic challenges from coal producers, coal transporters, financial institutions, environmentalists, and various local, state and federal regulators. It was the consensus of WCTL's charter members that their effectiveness in prevailing against common challenges would be enhanced through the medium of group action. Hence in 1977, five coal shipping and receiving firms formed WCTL to coordinate, advance and protect their common interests in connection with their utilization of coals mined west of the Mississippi River.

From 1977 to present, WCTL has been at the forefront of every significant matter impacting the delivered prices of western coal including:

- the promulgation of the Coal Rate Guidelines governing maximum rail rates on coal;
- the valuations of coal for federal royalty purposes;
- oppositions to the mergers of western coal railroads and western coal mining companies;
- the defeat of various attempted taxes on the production of western coal.

Many of WCTL's undertakings on behalf of western coal consumers are chronicled in the reports of various courts and agencies.¹

WCTL is a voluntary association whose activities are determined by a nine (9) member Executive Board and its President, Vice President and Treasurer.

WCTL holds two (2) meetings each year. (Fall and Winter) The Fall meeting, held in Washington, D.C., focuses upon emerging legislative and regulatory developments. The Winter meeting affords the members an opportunity to participate in small seminars and workshops which provide in depth treatment of topics and developments of current interest and concern.

For membership information, please contact:

Mr Duane Richards, President, Western Coal Traffic League, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, duane@westernfuels.org.

¹ *W. Coal Traffic League v. U.S.*, 677 F.2d 915 (D.C. Cir. 1982); *W. Coal Traffic League v. U.S.*, 694 F.2d 378 (5th Cir. 1982); *W. Coal Traffic League v. I.C.C.*, 735 F.2d 1408 (D.C. Cir. 1984); *W. Coal Traffic League v. Surface Transp. Bd.*, 169 F.3d 775 (D.C. Cir. 1999); *W. Coal Traffic League v. Surface Transp. Bd.*, 528 U.S. 950 (1999); *Western Coal Traffic*

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League v. Union Pac. R.R., STB Finance Docket No. 33726, 4 STB 685 (STB served May 12 2000); *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168 (D.C. Cir. 2000); *W. Coal Traffic League v. Surface Transp. Bd.*, 264 Fed. Appx. 7 (D.C. Cir. 2008).

VERIFICATION

I, Duane L. Richards, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.


Duane L. Richards

Executed on February 6, 2012